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No. 93-523

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

IN RE: GRAND JURY SUBPOENA DUCES TECUM DATED OCTOBER 29, 1992.

JOHN DOE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

This petition for certiorari presents the issue of whether the Fifth Amendment privilege against self-incrimination protects an individual from being compelled to disclose the contents of confidential entries in his private and personal pocket-diary. In its brief, the Government concludes that "[t]he petition for a writ of certiorari should be granted," correctly observing that the courts of appeals have rendered conflicting decisions concerning this constitutional issue and that the question recurs with some frequency. Brief for the United States ("Br.") at 10, 11.[1] Given the Government's concurrence as to the appropriateness of certiorari review, petitioner limits this reply to clarifying two points supportive of granting this petition.

1. First, the Government understates the need for certiorari review to clarify the continuing viability *vel non* of the Court's holding in *Boyd v. United States*, 116 U.S. 616 (1886), that the Fifth Amendment protects the contents of private and personal documents. While implicitly conceding that the Court has never specifically held to the contrary, the Government attempts to minimize *Boyd*'s protection of private papers as "dicta." Br. at 8. The Court has already rejected this assertion. *Couch v. United States*, 409 U.S. 322, 330 (1973) ("*Boyd* did hold that 'any forcible and compulsory extortion of . . . private

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[1] The frequency is considerably greater than appears from the reported decisions (although they are quite numerous), because the issue is most commonly litigated in sealed and unreported proceedings (because of grand jury secrecy) and the district court's interlocutory decision can be immediately appealed as of right only by the Government.

papers' . . . violated the . . . Fifth Amendment[ ]") (quoting *Boyd*, 116 U.S. at 630). Moreover, the Government's reliance for its assertion on *Andresen v. Maryland*, 427 U.S. 463, 471 (1976), is misplaced, since *Andresen* concerned the seizure of documents, rather than a subpoena (as in *Boyd*). Moreover, none of the Court's recent decisions dealing with the Fifth Amendment and the contents of documents has stated that *Boyd*'s protection of private papers is dictum, nor has that generally been the received reading of *Boyd* in the courts of appeals. Petition for Certiorari ("Pet.") at 11-12 & nn.6-8.

If *Boyd*'s protection of private papers from compulsory process is not dictum, that fact alone provides an additional reason for granting certiorari. Although the Government urges that *Boyd* has not survived the "reasoning" of the Court's later decisions, Br. at 8, that question can be answered by the Court and only the Court. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quigas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

2. Second, while recognizing the existence of a conflict among the circuits, the Government understates the extent of that conflict -- and, indeed, the entire confusion in the circuits -- regarding the issue here. For example, the Government conjectures that two of the circuits that have ruled contrary to the ruling of the court of appeals in this case -- *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); and *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042-44 (3d Cir. 1980) -- might reconsider their position based on the Court's later opinions in *United States v. Doe*, 465 U.S. 605 (1984), and *Baltimore Department of Social Services v.*

Bouknight, 493 U.S. 549 (1990). Br. at 9. This speculation is without a sound basis. Quite aside from the fact that neither *Doe* nor *Bouknight* involved private papers, the "rationale" for *Doe* and *Bouknight* was taken directly from *Fisher v. United States*, 425 U.S. 391 (1976) (another case not involving private papers), and the Third and Fifth Circuits in the aforementioned decisions expressly rejected the suggestion that *Fisher* undermined *Boyd*'s protection of private papers. Moreover, at least four other courts of appeals have observed or implied that *Fisher*, *Doe*, and *Bouknight* did not put *Boyd* to rest.[2]

As for the prior circuit court decisions the Government claims are consistent with the decision below, Br. at 8, at least two of the three decisions --*In re Sealed Case*, 877 F.2d 83 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990), and *In re Grand Jury Proceedings on February 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) -- did not involve private papers at all, but business records.[3] Thus, these courts of appeals had no occasion to

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[2] See the decisions from the First, Sixth, Eighth, and Eleventh Circuits cited in the Petition at 11 n.7. *See also In re Grand Jury Subpoena (Maltby)*, 800 F.2d 981, 986 (9th Cir. 1986) (Poole, J., dissenting) (observing that, although the issue was not reached by the panel majority, "the holding in *Doe* is limited to the business records context presented in that case and does not preclude [the witness] from claiming a Fifth Amendment privilege in his personal non-business records"); *United States v. Porter*, 711 F.2d 1397, 1401 (7th Cir. 1983) (finding to be well founded District Court Judge Milton Shadur's determination that "*Boyd* did in fact survive *Fisher*") (dicta).

[3] The preparation of documents for personal and private use, unlike the creation of business records, does not involve communication

Footnote continued

address, and did not address, the issue resolved below and presented for review whether the contents of private papers are protected under the Fifth Amendment. Accordingly, the decision below of a divided Second Circuit panel, far from suggesting any trend toward consistency among the circuits, is simply the latest evidence of the wide appellate disagreement over the question presented here and the consequent need for review by the Court.

Footnote continued from previous page

with others. When the government demands documents containing mental impressions preserved for private use only, it is not simply obtaining the contents of the individual's earlier, voluntary "testimony" to others but is compelling the individual to speak to others and be a "witness against himself" for the first time.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari and the Brief for the United States, the petition for writ of certiorari should be granted.

Dated: January 11, 1994

Respectfully submitted,

/s/ Jed S. Rakoff
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